

Concerted Refusals to Deal and the Producer Interest in Antitrust

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I. INTRODUCTION

The New Orthodoxy in antitrust, sometimes described as the "Chicago School," holds that the only proper objective of antitrust is the protection of consumer welfare.¹ Its adherents rely on Supreme Court pronouncements that "Congress designed the Sherman Act as a 'consumer welfare prescription,'"² and that "[i]t is competition, not competitors, which the Act protects."³ Yet the Supreme Court has never ruled that producers are excluded from the protection of the antitrust laws and has frequently held to the contrary. In *Mandeville Island Farms v. American Crystal Sugar*,⁴ the complaint charged a conspiracy among buyers of sugar beets to pay a uniform price for the product.⁵ In sustaining the complaint, the Supreme Court observed:

It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers.⁶ . . .

The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims by the forbidden practices by whomever they may be perpetrated.⁷

It is the thesis of this Article that *Mandeville Island Farms* is good law, not only as it applies to buyer collusion, but in its general doctrinal theme.⁸ The antitrust laws were intended to protect producers as well as consumers and may properly be invoked by producers in cases in which consumer interests are not implicated.

In the continuing debate over the proper role of antitrust, most attention has been

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1. See R. BORK, *THE ANTITRUST PARADOX* 71, 89 (1978); R. POSNER, *ANTITRUST LAW* 18-20 (1976); Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986); Gerhart, *The Supreme Court and Economic Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 321; cf. 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* 103-13 (1978) (discussing populist as well as economic antitrust objectives).

See also Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714 (1986); Hovencamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); Hovencamp, *Chicago and Its Alternatives*, 1986 DUKE L. J. 1014; Wiley, "After Chicago": *An Exaggerated Demise?*, 1986 DUKE L. J. 1003.

2. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting R. BORK, *supra* note 1, at 66). The Sherman Act is codified at 15 U.S.C. §§ 1-7 (1982).

3. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

4. 334 U.S. 219 (1948).

5. *Id.* at 223.

6. *Id.* at 235.

7. *Id.* at 236.

8. Buyer collusion may adversely affect consumers if, as a result of the collusion, the supply offered is less than the competitive norm and, as a consequence, the buyers' prices to consumers (on resale) are enhanced. But if buyers purchase in local markets and sell in a national market, and if the national market is competitive, collusion among buyers will not have any impact upon the national market or on consumer interests. In such a case, the colluding buyers will be able to expropriate rents otherwise accruing to more favorably situated sellers, but price and output in the national market (in which the colluding buyers resell) will be determined by the normal interplay of competitive forces. For an example, see *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

attracted by views at the extreme. As noted, the Chicago School confines antitrust to the protection of consumer welfare. Adversaries tend to propound a multiplicity of antitrust objectives: the control of corporate power in both the economic and political spheres; the preservation of small business and small business opportunities; and the protection of traders against oppression and unfair dealing.⁹ This Article makes a more limited case against the position of the Chicago School. It asserts that antitrust protects competitive markets and access to such markets, and that the protection thus afforded extends to producers as well as consumers. To provide a reasonably focused exposition, discussion is confined to agreements among business firms not to deal with other business firms.¹⁰

A concerted refusal to deal may injure consumers in one of three ways:

(1) Competitors may agree to adhere to specific terms and to refuse to deal on any other basis, thereby depriving purchasers of the opportunity to choose among diverse proposals. If the subject of the agreement is price, or some term closely related to price, the agreement is unlawful *per se*.¹¹ Concerted action on other terms—such as a requirement that disputes be submitted to arbitration—also may be unlawful.¹²

(2) Competitors may engage in price fixing, or in some other form of cartel activity, and seek to enhance the effectiveness of their endeavors by refusing to deal

9. See, e.g., *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977).

10. See, e.g., L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 83–92 (1977); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); Brunet & Sweeney, *Integrating Antitrust Procedure and Substance after Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015 (1986); Heidt, *Industry Self-Regulation and the Useless Concept "Group Boycott"*, 39 VAND. L. REV. 1507 (1986); Kissam, *Antitrust Boycott Doctrine*, 69 IOWA L. REV. 1165 (1984); Ponsoldt, *The Application of Sherman Act Antiboycott Law to Industry Self-Regulation: An Analysis Integrating Nonboycott Sherman Act Principles*, 55 S. CAL. L. REV. 1 (1981); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Refusals to Deal Under the Federal Antitrust Laws*, 45 VA. L. REV. 1165 (1959); Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966); Comment, *Northwest Wholesale: Group Boycott Analysis and a Role for Procedural Safeguards in Industrial Self-Regulation*, 47 OHIO ST. L.J. 729 (1986).

This Article does not address the special issues posed when a concerted refusal to deal is intended to influence political or governmental activity. See, e.g., *Superior Court Trial Lawyers' Ass'n v. FTC*, 856 F.2d 226 (D.C. Cir. 1988); *Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980); Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962); Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983 (1982).

11. On price-fixing generally, see *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210–28 (1940). On terms related to price, see *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (credit terms). The antitrust laws condemn some practices under all circumstances (*per se* illegality); other practices must be shown to have an anticompetitive purpose or effect in particular circumstances (a "rule of reason" inquiry).

12. See *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930) (concerted action to compel submission of disputes to arbitration); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44 (1930) (concerted action to require security deposits); *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926) (concerted action to regulate manner of hiring seamen); *Quinonez v. National Ass'n of Sec. Dealers*, 540 F.2d 824 (5th Cir. 1976) (concerted action restricting employment of recently discharged representatives); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973) (concerted action to compel suppliers to contribute to a fund to attract convention business); *Union Circulation Co. v. FTC*, 241 F.2d 652 (2d Cir. 1957) (concerted action restricting employment of recently discharged representatives). But cf. *Drayer v. Krasner*, 572 F.2d 348, 354–55 (2d Cir.), cert. denied, 436 U.S. 948 (1978) (expressing doubt as to continued vitality of *Paramount Famous Lasky*); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 335–36 (7th Cir. 1967) (premising invalidity of employee restrictions on adverse impact in product market). See also *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 477 (1986) (concerted refusal to furnish x-rays to insurance companies held to be unlawful).

with competitors, suppliers, or customers.¹³ For example, an effort by manufacturers to maintain resale prices may be enforced by their concerted refusal to sell to price-cutting distributors. Such conduct is unlawful *per se*.¹⁴

(3) Competitors may seek to exclude from the market a particular class of rivals by denying them access to a resource or facility needed for effective competition. The effort, if successful, would deprive consumers of an alternative product that might be less expensive or more attractive than the product offered by members of the combination. Such activity has been condemned in numerous decisions.¹⁵

The focus of this discussion is on instances in which the consumer interest is *not* implicated, at least not in any obvious way. The question is whether concerted refusals to deal are unlawful when the only identifiable adverse impact is on the producer disadvantaged by the concerted action.

II. THE EVOLUTION OF SUPREME COURT DOCTRINE

Early United States Supreme Court decisions evidenced concern for producer welfare, but the concerted actions in issue clearly affected consumers adversely.¹⁶ The starting point of the present inquiry is the Supreme Court's 1945 opinion in *Associated Press v. United States*.¹⁷

The Associated Press (AP) was a cooperative association of more than 1200 newspapers engaged in the collection, assembly and distribution of news. Some news was generated by AP's employees and some by AP's member newspapers. Bylaws of the Association barred members from providing AP news, including their own spontaneously generated news, to nonmembers. They also imposed a substantial discriminatory barrier to new membership in AP in the case of publishers competing with existing members.¹⁸ In a civil action instituted by the Government, AP was directed to provide nondiscriminatory access to membership for competitors and noncompetitors alike. Pending revision of its procedures, AP was barred from enforcing its requirement that AP news not be furnished to nonmembers; but this requirement could be reinstated once the improper restrictions on membership had been removed. The Supreme Court condemned the members' "common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."¹⁹ The exclusive right to publish AP news "gives many

13. See, e.g., *United States v. Women's Sportswear Ass'n*, 336 U.S. 460 (1949); *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

14. See, e.g., *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); cf. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (refusal to sell to maintain maximum prices), *overruled on another issue by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

15. See, e.g., *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (exclusion of discount car outlets); *American Medical Ass'n v. United States*, 317 U.S. 519 (1943) (exclusion of prepaid health services); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) (exclusion of "style pirate" dress manufacturers); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (exclusion of wholesalers also selling at retail); cf. *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) (coercion in placement of construction contracts so as to favor nonunionized employers).

16. See, e.g., *Montague & Co. v. Lowry*, 193 U.S. 38, 47 (1904).

17. 326 U.S. 1 (1945).

18. *Id.* at 4.

19. *Id.* at 15.

newspapers a competitive advantage over their rivals. Conversely, a newspaper without AP service is more than likely to be at a competitive disadvantage."²⁰

The *Associated Press* case, to the extent that it struck down discriminatory membership restrictions, implements the "essential facilities" doctrines, which requires that firms be given reasonable access to facilities considered essential to competitive viability.²¹ But the case is equally significant for what it did not do. Absent the improper membership restrictions, AP could insist that its members not furnish AP news to nonmembers, and furnish their own spontaneous news exclusively to AP, even though such conduct amounted to a concerted refusal to deal with nonmembers. Although the point was developed only in the dissenting opinion,²² the permitted refusals to deal were clearly sustainable as restraints reasonably ancillary to a legitimate joint venture.

The restrictions in *Associated Press* limited competition in newspaper publication in the communities served by AP members. But the Supreme Court defined no relevant markets and refused to consider the impact of the restrictive membership rules in limiting the access of readers to AP news.²³ It was considered sufficient that the challenged rules impaired the ability of nonmembers to compete with member publishers. Yet the interests of consumers were not necessarily ignored. As Judge Learned Hand had observed in the decision under review, "the interests of the newspaper industry [are not] conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as possible."²⁴ To find an unambiguous vindication of producer interests, it is necessary to look beyond *Associated Press*.

The next significant decision was *Klor's, Inc. v. Broadway-Hale Stores*.²⁵ Klor's was a San Francisco retailer engaged in the sale of refrigerators, television sets, and other household appliances. Broadway-Hale, a department store chain, operated a store next door, competing in the retail distribution of the same appliances. Klor's alleged that manufacturers and distributors of major brands—such as General Electric, RCA, and Zenith—had conspired among themselves and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and on unfavorable terms. Klor's brought suit under the Sherman Act, alleging that the conspiracy had seriously impaired its ability to compete.²⁶

The defendants responded by showing that "there were hundreds of other household appliance retailers in San Francisco, some within a few blocks of Klor's who sold many competing brands of appliances, including those that the defendants refused to sell to Klor's."²⁷ The Court of Appeals affirmed summary judgment for

20. *Id.* at 17–18.

21. See *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 409–10 (1912), discussed at 326 U.S. 25 (1945) (Frankfurter, J., concurring).

22. *Associated Press*, 326 U.S. at 330–38 (Roberts, J., dissenting).

23. *Id.* at 18.

24. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y.), *aff'd*, 326 U.S. 1 (1945).

25. 359 U.S. 207 (1959).

26. *Id.* at 209–10.

27. *Id.*

the defendants, stating that “a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured.”²⁸ It held that the required public injury was missing in this case because “[t]here was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality. . . .”²⁹ The Supreme Court observed that this “holding, if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively.”³⁰

The Court of Appeals’ decision was reversed. The Supreme Court held that the conduct of the defendants constituted a group boycott and was unlawful *per se*:

Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor’s its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants’ products. . . . As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.³¹

Klor’s was followed in short order by *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*³² Radiant Burners manufactured a ceramic gas burner for the heating of houses and other buildings. It sought to obtain a “seal of approval” from the American Gas Association (AGA), but was twice rejected. Without the seal, gas utilities refused to provide gas for use in Radiant Burners’ product, and potential customers declined to buy a product for which they could not obtain gas. In bringing suit under the Sherman Act, Radiant Burners alleged that the AGA tests were not based on objective standards, but were influenced by AGA members, some of whom manufactured products in competition with plaintiff; that the seal of approval had been improperly withheld; and that the utilities refusing to supply gas also were members of AGA.³³

The Court of Appeals affirmed dismissal of the complaint. It found no group boycott or other *per se* violation and ruled that, in the absence of a *per se* offense, an individual competitor may recover “only under circumstances where there is such general injury to the competitive process that the public at large suffers economic

28. *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 255 F.2d 214, 233 (9th Cir. 1958), *rev’d*, 359 U.S. 207 (1959).

29. *Id.* at 230.

30. *Klor’s*, 359 U.S. at 210.

31. *Id.* at 212–13. The Court continued: “Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.” *Id.* at 213.

It should be emphasized that *Klor’s* was decided on a motion for summary judgment. Whether the alleged conspiracy could be proved is doubtful. Most likely, *Klor’s* would have been able to show no more than a series of separate agreements between Broadway-Hale and each manufacturer or distributor, in which Broadway-Hale obtained exclusivity or preferential treatment in relation to *Klor’s*. Such separate vertical agreements would not be subject to the ruling in the *Klor’s* opinion, amounting in essence to “a manufacturer and a dealer agreeing to an exclusive distributorship.” *Id.* at 212. *See, e.g.*, *Lomar Wholesale Grocery v. Dieter’s Gourmet Foods*, 824 F.2d 582 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 707 (1988).

32. 364 U.S. 656 (1961).

33. *Id.* at 657–59.

harm.”³⁴ Such public injury was not alleged here since “[t]he allegations of [the] plaintiff’s complaint fail to establish that there has been any appreciable lessening in the sale of conversion gas burners or furnaces or that the public has been deprived of a product of overall superiority.”³⁵ The Supreme Court reversed on the basis of *Klor’s*. “The alleged conspiratorial refusal to provide gas for use in plaintiff’s Radiant Burners [has a monopolistic tendency]. ‘As such it is not to be tolerated merely because the victim is just one [manufacturer] whose business is so small that his destruction makes little difference to the economy.’”³⁶

Radiant Burners is similar to *Associated Press* in that the legality of the underlying combination was not challenged. The Supreme Court did not object to the testing of gas appliances to determine their safety. The decision turned on allegations that the seal of approval had been improperly withheld in order to protect competitors against the rivalry of plaintiff’s product.

The most comprehensive statement of the Supreme Court’s position appeared in *Silver v. New York Stock Exchange*.³⁷ Silver operated two registered broker-dealers engaged in trading securities in the over-the-counter market. Neither was a member of the New York Stock Exchange, but each had private wire connections to the offices of several Exchange members. When the Exchange directed its members to discontinue the private wire connections, Silver’s business was substantially diminished. The Exchange declined to provide any explanation or justification for its action. Silver sued under the Sherman Act and obtained summary judgment.³⁸ The Supreme Court reasoned:

The concerted action of the Exchange and its members here was . . . a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively. . . . Hence, absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act.³⁹

The Court found that concerted action by Exchange members could be justified by their statutory duty of self-regulation under the Securities Exchange Act, but it concluded that the justification was not available in this case because of the failure of the Exchange to provide Silver with appropriate notice and hearing.

Since the antitrust laws serve, among other things, to protect competitive freedom, *i.e.*, the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable.⁴⁰ . . . The point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather that, in acting without according petitioners these safeguards . . . , the Exchange has plainly exceeded the scope of its

34. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 273 F.2d 196, 200 (7th Cir. 1959), *rev’d*, 364 U.S. 656 (1961).

35. *Id.*

36. *Radiant Burners*, 364 U.S. at 660 (quoting *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959)).

37. 373 U.S. 341 (1963).

38. *Id.* at 343–45.

39. *Id.* at 347–49.

40. *Id.* at 359–60.

authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation.⁴¹

At no point did the Supreme Court attach significance to the fact that Silver and his companies were obviously very minor participants in the over-the-counter securities market; their decline or demise could have had no impact upon the functioning of that market. But the Court did emphasize the market power of the Exchange and the importance of assuring that the exercise of that power was consistent with the statutory responsibilities of the Exchange.

The next Supreme Court decision, *American Society of Mechanical Engineers v. Hydrolevel Corp.*,⁴² dealt with a tangential issue. The existence of an antitrust violation was not disputed. Even so, the tenor of the opinion—and the facts with which it was concerned—are significant.

The American Society of Mechanical Engineers (ASME), a nonprofit corporation with 90,000 members, published over 400 codes and standards governing different aspects of engineering and industry practice. One was the Boiler and Pressure Vessel Code, adopted by 46 states and all but one of the Canadian provinces. The Code set forth standards for components of heating boilers, including “low-water fuel cutoffs,” which blocked the flow of fuel to the boiler before the water level reached a dangerously low point that could lead to a “dry fire” or an explosion. McDonnell & Miller, Inc. (M & M) was the dominant firm in low-water fuel cutoffs. When confronted with competition from a new device manufactured by Hydrolevel, M & M caused ASME to issue statements indicating that Hydrolevel’s product did not comply with the Code. The statements were obtained by improper activities of M & M employees who were members of ASME committees and subcommittees. Hydrolevel was adversely affected by the statements and brought an antitrust claim against M & M and affiliated companies and against ASME.⁴³ The Supreme Court affirmed a judgment against ASME, based on the misconduct of its agents (M & M employees), acting within the apparent scope of their authority:

ASME wields great power in the Nation’s economy. Its codes and standards influence the policies of numerous States and cities, and . . . its interpretations of its guidelines “may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,” as well as entire segments of an industry. . . . When [ASME] cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace.⁴⁴

41. *Id.* at 364–65.

42. 456 U.S. 556 (1982).

43. *Id.* at 554–64.

44. *Id.* at 570–71 (quoting H. R. REP. No. 1981, 90th Cong., 2d Sess. 75 (1968)). The corporate defendants had settled with Hydrolevel and were not involved in the Supreme Court proceedings.

Apart from its comment on the dominance of M & M, the Supreme Court did not examine the nature or extent of competition in the market for low-water fuel cutoffs or in any other market.⁴⁵

ASME is not a conventional boycott case. But it is obviously similar in purport to *Radiant Burners*. The Supreme Court did not question the validity of the group's safety standards program, but it sustained an antitrust judgment against ASME and its members when the program was improperly manipulated for the benefit of one competitor at the expense of another.

The Supreme Court's most recent articulation on the issue at hand is *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*⁴⁶ Northwest was a purchasing cooperative made up of approximately 100 office supply retailers in the Pacific Northwest. The cooperative acted as a wholesaler for the retailer members and for other retailers as well. All retailers purchased at the same price from Northwest, but members received a percentage rebate representing a share of Northwest's profits. Northwest also provided some warehousing facilities for members. "The cooperative arrangement thus [permitted] the participating retailers to achieve economies of scale in purchasing and warehousing that would otherwise [be] unavailable to them."⁴⁷ Pacific was a member of Northwest. It sold office supplies at both the wholesale and retail levels. Following a change in its ownership, Pacific was expelled from membership in Northwest. Pacific argued that the expulsion was the result of Pacific's decision to maintain wholesale operations. Northwest contended that the expulsion resulted from Pacific's failure to notify cooperative members of the change in its ownership. There was no notice or hearing, and Pacific was given no opportunity to challenge the expulsion decision. As a result of the expulsion, Pacific lost annual rebates approximating \$10,000, but there were no other "allegations indicating the nature and extent of competitive injury the expulsion [had] caused Pacific to suffer."⁴⁸

In its antitrust suit under the Sherman Act, Pacific prevailed in the Court of Appeals on summary judgment on the ground that Northwest had failed to provide appropriate procedural safeguards as required by *Silver*. The Supreme Court reversed. It viewed *Silver* as the product of a need "to accommodate the important national policy of promoting effective exchange self-regulation, tempered by the principle that the Sherman Act should be narrowed only to the extent necessary to effectuate that policy"⁴⁹ In this case, there was no need "to accommodate any competing congressional policy requiring discretionary self-policing."⁵⁰

45. The Second Circuit, from which the case had been appealed, found a violation without examining market impact: "Given the effect and intent of [M & M's actions,] the restraint was surely unreasonable: it intentionally misinterpreted the Code so as to prevent Hydrolevel from selling its product." *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, 635 F.2d 118, 124 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982).

46. 472 U.S. 284 (1985).

47. *Id.* at 286-87.

48. *Id.* at 287.

49. *Id.* at 292.

50. *Id.* at 293.

In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest's members would amount to a *per se* violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a *per se* violation because the antitrust laws do not themselves impose on joint ventures a requirement of process.⁵¹

Turning to the question of whether the decision to expel Pacific could be held unlawful *per se* as a group boycott, the Court observed that cases finding *per se* illegality

generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relations the competitors need in the competitive struggle." . . . See, e.g., *Silver* . . . (denial of necessary access to exchange members); *Radiant Burners* . . . (denial of necessary certification of product); *Associated Press* . . . (denial of important sources of news); *Klor's* . . . (denial of wholesale supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, . . . and frequently the boycotting firms possessed a dominant position in the relevant market. . . . In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.⁵²

The Court observed that wholesale purchasing cooperatives like Northwest "are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects."⁵³ Rather, such cooperative arrangements were designed to increase economic efficiency—by affording economies of scale in purchasing and warehousing and more ready access to merchandise on short notice—and rendered markets more, rather than less, competitive, by enabling smaller retailers to reduce prices and maintain stock "so as to compete more effectively with large retailers."⁵⁴ As to the expulsion itself, the Court found that the disclosure requirements were related to the effective functioning of the cooperative, and observed that the "act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect."⁵⁵ Moreover, unless the cooperative "possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted. . . . At no time has Pacific made a threshold showing that these structural characteristics are present in this case."⁵⁶

51. *Id.*

52. *Id.* at 294 (quoting L. SULLIVAN, *supra* note 10, at § 92).

53. *Id.* at 295.

54. *Id.*

55. *Id.* at 296.

56. *Id.* at 296–97. Referring to Pacific's argument that Northwest's motive in the expulsion was to place Pacific at a competitive disadvantage in retaliation for Pacific's decision to engage in independent wholesale operations, the Court described this purpose as "more troubling" than the justification given by Northwest. "If Northwest's action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices, an inference of anticompetitive animus might be appropriate. But such an argument is appropriately evaluated under the rule of reason analysis." *Id.* at 296 n.7. The Government's amicus brief, which urged reversal in this case,

Accordingly, the Supreme Court concluded that case should be judged under a "rule of reason" analysis, rather than held unlawful under the *per se* rule, and remanded the case for further proceedings.

Northwest Wholesale Stationers makes explicit the point implicit in *Associated Press*—that a concerted refusal to deal may be lawful if reasonably ancillary to a legitimate joint venture. It emphasizes the element of market power, but it does not state that market power is essential in all cases. Most troublesome is the Court's discussion of the procedural aspects of the expulsion. Surely there are cases (apart from the statutory self-regulation of the *Silver* case) in which the outcome will be strongly influenced by the propriety of procedures. In *ASME*, for example, it is inconceivable that antitrust liability could turn on a judicial determination that a boiler component was in fact safe, when the relevant trade association had reached a contrary conclusion on the basis of impartial (but erroneous) testing.

Most significantly, nothing in *Northwest Wholesale Stationers* conflicts with the proposition that a concerted refusal to deal may be condemned as unlawful if it impairs the ability of a producer to compete, without regard to possible impact on consumers, if the impairment is not justified by legitimate business reasons.

III. CONCERTED REFUSALS IN THE LOWER COURTS

Concurrent with the evolution of Supreme Court doctrine, the lower federal courts actively participated in developing antitrust responses to concerted refusals to deal—encompassing important areas of economic activity not touched by Supreme Court precedents directly on point.

In cases involving organized sports, the federal courts have taken the position that self-regulation is necessary to the success of the joint venture. Some of the restrictions adopted by sports organizations have been sustained,⁵⁷ some have been

stated: "Membership restrictions drawn with the sole purpose of injuring rivals would of course be inherently suspect as 'naked' restraints on competition." Brief for the United States as *Amicus Curiae* at 16 n.14, *Northwest Wholesale Stationers*, 472 U.S. 284 (No. 83-1368).

57. See *Brenner v. World Boxing Council*, 675 F.2d 445 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982) (suspension of fight promoter for improper practices); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979) (exclusion of player because of physical infirmity); *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977) (limitation on number of assistant coaches); *Bridge Corp. of America v. American Contract Bridge League*, 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971) (exclusion of equipment found unsuitable); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (exclusion of player because of lack of skill); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 511 F. Supp. 1103 (D. Neb.), *aff'd per curiam*, 665 F.2d 222 (8th Cir. 1981) (exclusion of equipment found unsuitable); *Brant v. United States Polo Ass'n*, 631 F. Supp. 71 (S.D. Fla. 1986) (suspension of player for abusive language; denial of preliminary injunction); *Cooney v. American Horse Shows Ass'n*, 495 F. Supp. 424 (S.D.N.Y. 1980) (suspension of trainer because of improper practices); *College Athletic Placement Service v. National Collegiate Athletic Ass'n*, 1975 CCH Trade Cases ¶ 60,117 (D.N.J.), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974) (exclusion of commercial firms assisting in obtaining college athletic scholarships); *STP Corp. v. United States Auto Club, Inc.*, 286 F. Supp. 146 (S.D. Ind. 1968) (equipment specifications); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961) (exclusion of player because of gambling).

invalidated⁵⁸ and some have been remanded for further hearings.⁵⁹ For present purposes, the most significant aspect of these opinions is their focus on the plight of the individual competitor. For example, in *Denver Rockets v. All-Pro Management*,⁶⁰ an athlete had been excluded by the National Basketball Association.⁶¹ The court described the resulting harm:

First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services [the players' market] is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government. Of course, this is true only where [as here] the members of the combination possess market power in a degree approaching a shared monopoly.⁶²

The court ruled that, to support the exclusion of an athlete from competition, the NBA must meet these standards:

(1) [The case must be one in which] self-regulation is inherently required by the market's structure. . . .

(2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.

(3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.⁶³

A different approach was adopted in *Levin v. National Basketball Association*.⁶⁴ Prospective purchasers of a basketball team were rejected by the NBA on grounds of conflict of interest. Plaintiffs claimed that the real reason was personal animosity.⁶⁵ The court granted summary judgment for the defendant, ruling that, whatever the basis for rejection, there was no antitrust violation. "Here the plaintiffs wanted to *join* with those unwilling to accept them, *not to compete with them*, but to be partners with them in the operation of a sports league for plaintiffs' profit."⁶⁶ The court found

58. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (unreasonable restrictions on player mobility); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (unreasonable restrictions on player mobility); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966) (exclusion of nonmember establishments from organized bowling); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974), other issues in 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (unreasonable restrictions on player mobility); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (unreasonable restrictions on player mobility); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973) (exclusion of player without following proper procedures). See also *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) (restriction on ownership of soccer teams by NFL owners held unlawful on the basis of adverse impact on market).

59. See *Radovich v. National Football League*, 352 U.S. 445 (1957); *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949); *Phone Programs Illinois, Inc. v. National Jockey Club*, 692 F. Supp. 879 (N.D. Ill. 1988); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977); *Nassau Sports v. Hampson*, 355 F. Supp. 733 (D. Minn. 1972); *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972); *Boston Professional Hockey Ass'n v. Cheever*, 348 F. Supp. 261 (D. Mass. 1972), other issues in 472 F.2d 127 (1st Cir. 1972).

60. 325 F. Supp. 1049 (C.D. Cal. 1971).

61. *Id.* at 1054.

62. *Id.* at 1061.

63. *Id.* at 1064-65.

64. 385 F. Supp. 149 (S.D.N.Y. 1974).

65. *Id.* at 150-51.

66. *Id.* at 152. See also *Catrone v. Ogden Suffolk Downs, Inc.*, 683 F. Supp. 302 (D. Mass. 1988). The court rejected the antitrust complaint of a horse trainer barred from local racetracks by concerted action of the owners, holding

that there was neither anticompetitive purpose nor effect, and affirmed that the purpose of the antitrust laws was to protect competition, not competitors.

The two cases are reconcilable on their facts. Prospective owners may be viewed as seeking a partnership relation, and standards for association on that basis may well be selective and subjective. Moreover, the rejected applicant has other outlets for capital investment. The rejected player, by contrast, is foreclosed from a field of occupational endeavor in a relationship that has none of the characteristics of a partnership. *Denver Rockets* is typical of cases involving organized sports; *Levin* is the exception.

Competing firms may lawfully act in concert in other contexts if the purpose is to achieve partial integration of operations and there is no unreasonable impact on competition. Two or more firms may elect to use a common distributor⁶⁷ or transportation service,⁶⁸ to jointly procure insurance⁶⁹ or supplies,⁷⁰ or to perform a clearinghouse function.⁷¹ The selection of one mode of operation (e.g., one distributor) excludes other possible candidates. The exclusion is not normally actionable. Nor is the selection of an exclusive distributor by a single firm (or group of affiliated firms).⁷² In each instance, the excluded firms remain free to seek patronage of others in the market.⁷³

Greater scrutiny is required when the joint activity controls access to a market. Tobacco boards of trade regulate the selling time of warehouses in discrete geographical areas; if the allocation of time unreasonably favors some warehouses over others, the ability of the disadvantaged warehouses to compete is improperly

that the trainer must show that the challenged conduct "was injurious to the competitive process"; it was not enough for plaintiff to show "injury to him alone." *Id.* at 307. The decision is unsound. See discussion at *infra* notes 79-81 and 90-93.

67. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Interborough News Co. v. Curtis Publishing Co.*, 225 F.2d 289 (2d Cir. 1955); *cf.* *Topps Chewing Gum v. Major League Players Ass'n*, 641 F. Supp. 1179 (S.D.N.Y. 1986).

68. *Instant Delivery Corp. v. City Stores*, 284 F. Supp. 941 (E.D. Pa. 1968); *Parmelee Transp. Co. v. Keeshin*, 186 F. Supp. 533 (N.D. Ill. 1960), *aff'd*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961); *cf.* *International Rys. of Central America v. United Brands*, 532 F.2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

69. *Ackerman-Chillingworth v. Pacific Elec. Contractors Ass'n*, 579 F.2d 484 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

70. *M & H Tire Co. v. Hoosier Racing Corp.*, 733 F.2d 973 (1st Cir. 1984); *Langston Corp. v. Standard Register Co.*, 553 F. Supp. 632 (N.D. Ga. 1982).

71. *Worthen Bank & Trust Co. v. National Bancamericard Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *Florists' Nationwide Tel. Delivery Network v. Florists' Tel. Delivery Ass'n*, 371 F.2d 263 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967); *American Floral Servs. v. Florists' Transworld Delivery Ass'n*, 633 F. Supp. 201 (N.D. Ill. 1986).

72. See *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982); *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390 (2d Cir. 1980); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978); *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). *But cf.* *Com-Tel v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979) (price-fixing alleged).

73. For examples of partial integration, see *Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987) (jointly held franchise to provide taxi service at airport); *Phil Tolkan Datsun v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280 (7th Cir. 1982) (joint advertising campaign); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981) (joint preparation of racing information); *E.A. McQuade Tours v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) (joint preparation of manual listing package tours).

impaired.⁷⁴ Similarly, if access to a multiple listing service is necessary to compete effectively in local real estate markets, participation must be provided to all agents on reasonable terms.⁷⁵ The same is true of other facilities needed for effective competition.⁷⁶

In instances of industry self-regulation, including the testing of products, standards must be fairly drawn and properly applied.⁷⁷ As one court observed, the association "holds the reputations and the livelihood of its members within its absolute grasp."⁷⁸ The driving force in all of these cases is protection of the disadvantaged competitor. Consumer interests are rarely mentioned and in most cases appear to be at the periphery of judicial concern.

A contrary view has been expressed in a few cases. In *Products Liability Insurance Agency v. Crum & Foster Insurance Companies*,⁷⁹ an insurance broker complained of exclusion from the market as the result of a conspiracy between a rival broker and a group of affiliated insurance companies.⁸⁰ The Seventh Circuit, treating the arrangement as similar to an exclusive distributorship, found no antitrust violation. Judge Posner reasoned:

Now there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated. Those laws . . . are designed to protect the consumer interest in competition. . . . The consumer does not care how many sellers of a particular good or service there are; he

74. *Bale v. Glasgow Tobacco Board of Trade*, 339 F.2d 281 (6th Cir. 1964); *Danville Tobacco Ass'n v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964), second opinion, 372 F.2d 634 (4th Cir.), cert. denied, 387 U.S. 907 (1967); *Asheville Tobacco Board of Trade v. FTC*, 263 F.2d 502 (4th Cir. 1959), second opinion, 294 F.2d 619 (4th Cir. 1961); *Rogers v. Douglas Tobacco Board of Trade*, 244 F.2d 471 (5th Cir. 1957), second opinion, 266 F.2d 636 (5th Cir.), cert. denied, 361 U.S. 833 (1959); *American Fed'n of Tobacco Growers v. Neal*, 183 F.2d 869 (4th Cir. 1950).

75. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (discussing prior cases). See also *O'Riordan v. Long Island Board of Realtors*, 1988-2 CCH Trade Cases ¶ 68,248 (E.D.N.Y. Sept. 19, 1988) (conditions of membership in multiple listing service sustained as reasonable).

76. See *Mechanical Contractors Bid Depository v. Christiansen*, 352 F.2d 817 (10th Cir. 1965), cert. denied, 384 U.S. 918 (1966) (bid depository); *United States v. Southwestern Greyhound Lines*, 1953 CCH Trade Cases ¶ 67,470 (N.D. Okla. 1953) (bus terminal).

77. Industry self-regulation was sustained in *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598 (7th Cir. 1984) (pricing methods); *ECOS Elec. Corp. v. Underwriters Laboratories*, 743 F.2d 498 (7th Cir. 1984), cert. denied, 469 U.S. 1210 (1985) (product testing); *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126 (6th Cir.), cert. denied, 449 U.S. 826 (1980) (product testing); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977) (registration of horses); *Paralegal Inst. v. American Bar Ass'n*, 475 F. Supp. 1123 (E.D.N.Y. 1979), aff'd mem., 622 F.2d 575 (2d Cir. 1980) (accreditation of schools); *Cullum Elec. & Mechanical Inc. v. Mechanical Contractors Ass'n*, 436 F. Supp. 418 (D.S.C. 1976), aff'd, 569 F.2d 821 (4th Cir.), cert. denied, 439 U.S. 910 (1978) (bidding regulations); *Ve-Ri-Tas, Inc. v. Advertising Review Council*, 411 F. Supp. 1012 (D. Colo. 1976), aff'd, 567 F.2d 963 (10th Cir. 1977), cert. denied, 436 U.S. 906 (1978) (review of advertising); *Tropic Film Corp. v. Paramount Pictures*, 319 F. Supp. 1247 (S.D.N.Y. 1970) (motion picture ratings); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Ore. 1966), aff'd per curiam, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024 (1969) (product standards); *Rooffire Alarm Co. v. Royal Indemnity Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), aff'd per curiam, 313 F.2d 635 (6th Cir.), cert. denied, 373 U.S. 949 (1963) (product testing); *Hughes Tool Co. v. Motion Pictures Ass'n*, 66 F. Supp. 1006 (S.D.N.Y. 1946) (motion picture advertising); cf. *Moore v. Boating Indus. Ass'n*, 819 F.2d 693 (7th Cir.), cert. denied, 108 S. Ct. 160 (1987) (nature of certification program not clear).

78. *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008 (S.D. Ill.), aff'd mem., 506 F.2d 1404 (7th Cir. 1974) (preliminary injunction granted at behest of breeder). See also *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987), aff'd, 108 S. Ct. 1931 (1988) (jury verdict sustained against participant in standard setting organization).

79. 682 F.2d 660 (7th Cir. 1982).

80. *Id.* at 661-62.

cares only that there be enough to assure him a competitive price and quality. It thus would not be enough to show that [plaintiff had been excluded]. No inference could be drawn that the result of excluding [plaintiff] would be to raise the price, or diminish the quality, of product liability insurance. . . .⁸¹

The result in *Products Liability* is consistent with the prevailing view on exclusive distributorships. But to the extent that the opinion would permit concerted actions against an individual firm—impairing that firm's ability to compete—on the ground that consumer interests are not adversely affected, the opinion is inconsistent with prevailing Supreme Court precedents.

The issue is of particular importance in the health care industries and has been extensively litigated in that context, because access to a hospital or professional society or insurance program may be critical to the ability of a worker or business to compete.

In *Weiss v. York Hospital*,⁸² an osteopath (D.O.) applied for staff privileges at York Hospital and was rejected. He brought a class action against the hospital on behalf of himself and osteopaths similarly situated, alleging Sherman Act violations.⁸³ The jury found that the hospital and its medical staff "had engaged in a policy of discrimination against Dr. Weiss and the other D.O.s in the York MSA by applying unfair, unequal, and unreasonable procedures in reviewing their applications,"⁸⁴ and the district court concluded that "this unfair, unreasonable, and unequal treatment 'could reasonably be anticipated to cause osteopathic physicians to refrain from applying for staff privileges at the York hospital.'"⁸⁵ The Third Circuit concluded that the conduct of the defendants constituted a group boycott and was unlawful *per se*:

We recognize that the facts of this case do not precisely fit into the mold of the classical refusal to deal. The refusal to deal is not total insofar as York admitted Dr. Zittle and a number of other osteopaths. . . . Arguably then, what is at issue is not a boycott but mere discrimination which sounds less like a *per se* antitrust violation. However, given the evidence of the different standards applied to osteopaths and M.D.s and the second class citizenship afforded D.O.s upon admission to staff privileges at York, and in view of the adverse impact of these factors upon D.O. applications for York staff privileges, we are satisfied that the restrictive policy is, in purpose and effect, sufficiently close to the traditional boycott, that the characterization is appropriate.⁸⁶

The court recognized that individual doctors could be rejected on the basis of their lack of professional competence, and that such individual exclusions would have to be reviewed under the rule of reason. In this case, however, there was no contention of lack of competence or any other "legitimate explanation for the discrimination."⁸⁷

81. *Id.* at 663-64.

82. 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

83. *Id.* at 791-93.

84. *Id.* at 818 (quoting *Weiss v. York Hospital*, 548 F. Supp. 1048, 1053 (M.D. Pa. 1982)).

85. *Id.*

86. *Id.* at 819-20.

87. *Id.* at 820.

The appellate court found that York Hospital occupied a monopoly position in the York MSA,⁸⁸ and that its medical staff was apparently motivated by anticompetitive animus. Yet it made no finding as to the actual or probable impact of the challenged practice on the market for physician services.⁸⁹ Individual osteopaths were found to have sustained injury, but there were no detailed findings as to injury to competition.

A contrasting position was enunciated in *Marrese v. American Academy of Orthopaedic Surgeons*.⁹⁰ Plaintiffs, orthopaedic surgeons, contended that their exclusion from Academy membership impaired their ability to compete with surgeons who were members.⁹¹ The Seventh Circuit refused to permit the plaintiffs to go forward with discovery of the Academy's records until they had shown a probable anticompetitive effect. Judge Posner reasoned:

Assume that the market for orthopaedic surgery is local. . . . The plaintiffs will . . . have the burden at trial of showing that in these local markets the number of orthopaedic surgeons who belong to the Academy is so few that competition among them . . . cannot be relied upon to give the consuming public the benefits of competition. Unless they can show this they will be unable to ask the trier of fact to draw an inference that either the exclusion of an individual orthopaedist from a local market or the possible effect of that exclusion on the competitive behavior of other aspirants to membership could result in a higher price or lower quality of orthopaedic surgery in these communities.⁹²

It is arguable, particularly after *Northwest Wholesale Stationers*, that an exclusion from health care facilities or organizations should be actionable only in the event that the defendant controls access to the market or some resource significant for effective competition.⁹³ But *Marrese* goes too far in requiring an additional showing

88. *Id.* at 827. The court did not reach the question "whether, in order to constitute a *per se* illegal boycott, a conspiracy to exclude a group of potential competitors from hospital staff privileges requires that the hospital . . . possess substantial market power in the relevant market. This distinguishing factor might render the analysis in this case different from the analysis in a large metropolitan area." *Id.* at 819 n.58.

89. The district court had made findings, in accordance with the jury's verdict, that defendants had unreasonably restrained interstate commerce. *Weiss*, 548 F. Supp. at 1052. The Court of Appeals held in the alternative that, even under the rule of reason, an unreasonable restraint could be found, because: "(1) Weiss met his burden of production and persuasion that the purpose and effect of the defendants' discriminatory conduct was to 'foreclose so much of the market from penetration by [the M.D.s'] competitors [i.e., the D.O.s] as to unreasonably restrain competition in the affected market . . .,' and (2) the defendants . . . made no attempt to counter the evidence." *Weiss*, 745 F.2d at 822 n.61. There were, however, no detailed findings, in the decision of either the district court or the Court of Appeals, as to the extent to which the price, quality, or quantity of physician services had been affected.

90. 706 F.2d 1488 (7th Cir. 1983), *modified*, 726 F.2d 1150 (7th Cir. 1984), *rev'd on other grounds*, 470 U.S. 373 (1985).

91. *Id.* at 1492.

92. *Id.* at 1497.

93. See *Hahn v. Oregon Physicians' Serv.*, 860 F.2d 1501 (9th Cir. 1988); *Goss v. Memorial Hospital System*, 789 F.2d 353 (5th Cir. 1986); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986); *Registered Physical Therapists v. Intermountain Health Care*, 1988-2 CCH Trade Cases ¶ 68,233 (D. Utah Sept. 6, 1988).

For other decisions concerned with exclusions from health care organizations and facilities, see *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C.Cir. 1984); *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984); *St. Bernard Gen. Hospital v. Hospital Serv. Ass'n*, 712 F.2d 978 (5th Cir. 1983), *cert. denied*, 466 U.S. 970 (1984); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *Feminists Women's Health Center v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *Ballard v. Blue Shield*, 543 F.2d 1074 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); *Koefoot v. American College of Surgeons*, 652 F. Supp. 882 (N.D. Ill. 1986); *Reazin v. Blue Cross*, 635

of impairment of competition in the market for the services of the excluded participant. Whether the number of orthopaedic surgeons is large or small, individual participants should be protected against arbitrary exclusion.

IV. A CRITIQUE OF THE NEW ORTHODOXY

The New Orthodoxy asserts that antitrust is concerned exclusively with consumer welfare; producers have no standing to complain unless they can point to some adverse impact on consumers. The position is wrong on two counts: (1) there is no basis for claiming that consumer welfare is the sole objective of antitrust; and (2) efforts to rigorously segregate producer and consumer interests encounter severe, and perhaps insurmountable, methodological problems.

A. *The Objectives of Antitrust*

On the objectives of antitrust, there has been a wide-ranging debate.⁹⁴ This Article does not address all aspects of that controversy; the issue at hand is more narrowly focused. At a minimum, it is plain that the antitrust laws were intended to promote and preserve competitive markets; and the beneficiaries of such competition were to be producers as well as consumers. The passage of the Sherman Act was strongly influenced by injuries inflicted upon business firms; they were among the most obvious victims of the trusts.⁹⁵ The protection of producer interests was even more apparent in the passage of subsequent legislation: the Clayton⁹⁶ and FTC Acts⁹⁷ of 1914, the Robinson-Patman Act of 1936⁹⁸ and the Celler-Kefauver Act of 1950.⁹⁹ At the very least, these statutes stand for the proposition that business firms are among the intended beneficiaries of the competitive regime to be supported and sustained by antitrust.¹⁰⁰

F. Supp. 1287 (D. Kan. 1986), second opinion, 663 F. Supp. 1360 (D. Kan. 1987); *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982); *Nankin Hospital v. Michigan Hospital Serv.*, 361 F. Supp. 1199 (E.D. Mich. 1973). See also *Patrick v. Burget*, 108 S. Ct. 1658 (1988) (exclusion of doctor from hospital held actionable under antitrust notwithstanding defense based on state regulation).

94. See *supra* note 9.

95. On the political, economic, and legislative history of the Sherman Act, see, e.g., W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1954); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65, 82-106 (1982).

96. 15 U.S.C. §§ 12-27, 44 (1982 & Supp. IV. 1987); 29 U.S.C.A. § 52 (1973).

97. 15 U.S.C. §§ 41-51, 52-58 (1982 & Supp. IV. 1987).

98. 15 U.S.C. §§ 13-13c, 21a (1982 & Supp. IV. 1987).

99. 15 U.S.C. §§ 18, 21 (1982 & Supp. IV. 1987). See G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 11-48 (1924); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 *HARV. L. REV.* 226, 228-38 (1960); Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 *FORD. L. REV.* 1113, 1120-24 (1983); Lande, *supra* note 95, at 106-42.

100. In the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C.A. § 6a (Supp. 1988), Congress reaffirmed its commitment to protect the interests of individual competitors. In cases not affecting domestic markets or imports into the United States, the antitrust laws may be invoked where the challenged behavior has an effect on the export trade or commerce "of a person engaged in such trade or commerce in the United States" to the extent of "injury to export business in the United States." Thus, the antitrust laws are made applicable in cases in which the welfare of U.S. consumers is assumed not to be adversely affected. The provision is intended to protect individual competitors. See House Rep. No. 686, 97th Cong., 2d Sess. 7-8, 11-12 (1982); House Conf. Rep. No. 924, 97th Cong., 2d Sess. 29-30 (1982).

Nor is the protection of producers incompatible with an emphasis on competition. Competitive markets generate opportunities for both producers and consumers. Consumers may choose among different products and may purchase at competitive prices and under competitive conditions. Likewise, producers may choose among different markets and may sell at competitive prices and under competitive conditions. There is no justification for assuming that the right of one is superior to the right of the other. The opportunity to sell at competitive prices has been protected as zealously as the opportunity to buy at competitive prices; antitrust condemns interference with price by either buyers or sellers.¹⁰¹ Moreover, there is something amiss with an argument that consumers have a protected interest in purchasing sticks of chewing gum at competitive prices, but the very same persons—in their capacities as producers—may be excluded by combinations from the right to pursue an occupation or earn a living.

The protection of producer interests is not incompatible with the attainment of economic efficiency. Consumers are not entitled to every product that might conceivably be produced, nor access to every channel of distribution that might conceivably be utilized. A professional sports league may decide that franchises will be granted in some cities but not in others, and that the number of contests will be fifteen or fifty or one hundred and fifty. Individual consumers might wish to have a team in a non-franchised city, or to have a larger number of contests. But the efficient operation of a sports league requires that there be defined limits on operations, and dissatisfied consumers have no legitimate claim under the antitrust laws if the league performs the functions for which it was formed.

The same reasoning applies to producers. To the extent that joint operation is justified by considerations of efficiency, and exclusion is required to maintain efficient operations, the excluded producer cannot complain. To return to the example of the professional sports league, players cannot complain about exclusions premised on conduct incompatible with the efficient conduct of league operations—gambling, for example, that might taint the league in the eyes of the public. But exclusions unrelated to efficiency are another matter. The interest of the producer in pursuing an occupation is one of the oldest interests recognized in antitrust.¹⁰²

In sum, restrictions premised on concerted action may injure consumers or producers. Neither has a right to complain if the objective of the action is to achieve enhanced economic efficiency and the restriction is reasonably ancillary to that goal. But if economic efficiency is not the objective, or if the restriction is not reasonably related to that objective, then both producers and consumers have protectible interests under antitrust. The recent case of *National Collegiate Athletic Association v. Board of Regents*¹⁰³ provides an example. The Supreme Court condemned restrictions that

101. See *supra* note 8.

102. See *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Learned Hand, J.): "[W]hatever other conduct the [Antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling." See also *Blake, Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

103. 468 U.S. 85 (1984).

the NCAA had imposed on the televising of college football games. The interests of consumers were adversely affected by the restrictions and provided a basis for the Court's decision. But the Court found the restrictions detrimental, "not only for television viewers, but also for athletes. [Increased television exposure] means that smaller institutions appealing to essentially local or regional markets would get more exposure if the plan is enjoined, enhancing their ability to compete for student athletes."¹⁰⁴ There is simply no basis for the assertion that antitrust is concerned solely with the protection of consumer interests.¹⁰⁵

B. *The Separation of Producer and Consumer Interests*

Efforts to sharply differentiate between the interests of consumers and the interests of producers present another problem. For example, *Radiant Burners* and *ASME* involved the exclusion of new products. Were consumers injured by the exclusion? Absent a market assessment of the merit of the excluded product, it is impossible to say whether consumers were deprived of a significant innovation or an insignificant variation. The point is that such issues are to be resolved by the untrammelled interplay of market forces. The benefit to consumers cannot be ascertained until the process has run its course.

One might make a similar argument in the case of every excluded producer. If an athlete or physician is excluded by improper means, is it possible to make a meaningful determination as to the impact on consumer welfare? Perhaps the athlete will be a sensation, enormously appreciated by his fans. Perhaps the doctor will be a sensation, enormously appreciated by her patients. Fans and patients should have the opportunity to make these decisions unhindered by unjustified exclusions (or improper competitive handicaps) imposed by organizations acting beyond the bounds of legitimate joint enterprise.

In cases like *Klor's* and *Silver*, it is more difficult to identify a significant consumer interest. It is implausible to suppose that the continued presence of these plaintiffs had an impact on consumer welfare. But the Court in *Klor's* was concerned that the individual exclusion might be part of a larger trend; and the instigator of the boycott, Broadway-Hale, obviously viewed Klor's as a distinctive competitive threat. For some consumers, the choice between Klor's and Broadway-Hale was more significant than the choice between Broadway-Hale and the hundreds of other rivals remaining in the market.¹⁰⁶

The underlying problem relates to the process of market definition. The

104. *Id.* at 120 n.68.

105. Concerted refusals to deal may be competitive torts. See American Law Institute, *RESTATEMENT OF THE LAW OF TORTS* §§ 765-67 (1936). The category was deleted from the Second Restatement on the ground that it was within the general field of trade regulation rather than torts. American Law Institute, *RESTATEMENT (SECOND) OF TORTS* § 762 (introductory note at 2) (1977). There is an inevitable overlap between torts and antitrust; and not all competitive torts are antitrust violations. But the antitrust laws were intended to reach, and have been consistently construed to reach, exclusionary actions by firms or combinations wielding economic power. On the special problems posed by concerted action, see *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984).

106. See the similar line of reasoning in Areeda, *Introduction to Antitrust Economics*, 52 *ANTITRUST L.J.* 523, 536-37 (1983).

reasoning of the New Orthodoxy proceeds as follows: In the absence of a *per se* offense (such as price fixing), it is necessary to show market power adversely affecting competition in order to establish an antitrust violation.¹⁰⁷ An excluded producer must define a relevant market and persuade the court that its exclusion from the market adversely affected competition from the consumer's perspective. Klor's succeeded by persuading the Supreme Court that the concerted action in that case was unlawful *per se*. But that solution begs the question unless *per se* illegality can be premised on producer injury. Alternatively, Klor's might argue that the relevant market was competition between Klor's and Broadway-Hale and that the market so defined was adversely affected by the alleged combination. But the courts, particularly those populated by advocates of the New Orthodoxy, would be reluctant to accept a market defined so narrowly—even though, on the allegations of the complaint, Broadway-Hale behaved as if such a market were a distinctive competitive arena.

Silver is a harder case, because plaintiff's exclusion from the market was not motivated by anticompetitive animus. To relate the exclusion of *Silver* to the protection of consumer welfare is to formulate a rule so broad as to encompass every excluded producer. The argument would have to be that every producer improperly excluded shall be assumed to have had a role to play in protecting consumer welfare. But this is an extremely circuitous way of reaching a conclusion that can be stated more directly, and with much stronger support: producers as well as consumers are protected against exclusions or other adverse impacts unjustifiably imposed by business firms acting in concert. Carried to its extreme, the methodological convolutions return to support the initial and primary thesis of this Article.

C. *The Alignment of Objectives*

The position of the New Orthodoxy is that the antitrust laws have as their objective the advancement of consumer welfare through the promotion of economic efficiency. Rivalry is protected to the extent required to assure economic efficiency, but not otherwise. This description identifies the right variables, but it tells the story backwards.

The principal purpose of the antitrust laws is the promotion of competitive markets (which have favorable implications for consumers, producers, and other interests, including the political process).¹⁰⁸ Rivalry is important for a number of reasons and should be protected against incursions by restrictive practices. But

107. See, e.g., Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21 (1984). The view has been adopted by several Courts of Appeal. See *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 316 (8th Cir. 1986); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292 (5th Cir. 1981); *Cowley v. Bruden Indus.*, 613 F.2d 751, 756 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980). The Second Circuit has ruled to the contrary. See *Eiberger v. Sony Corp.*, 622 F.2d 1068, 1081 (2d Cir. 1980); *New York v. Anheuser-Busch, Inc.*, 673 F. Supp. 664 (E.D.N.Y. 1987). *Eiberger* reflects the well settled doctrine that antitrust liability "may be established by proof of either an unlawful purpose or an anticompetitive effect." *McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980) (emphasis in original).

108. For a more comprehensive discussion, see Blake & Jones, *Towards a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 422-40 (1965).

restrictions may be justified by the requirements of economic efficiency and such justifications are widely accepted.

In most cases, the two approaches yield similar results. But there are instances—such as concerted refusals to deal—where the misalignment of the New Orthodoxy leads to erroneous perceptions. In the absence of adverse impacts upon consumers, the New Orthodoxy would tolerate exclusionary tactics that victimize producers. There is no justification for such tolerance. Under a proper alignment of antitrust objectives, concerted refusals to deal are subject to scrutiny in every instance of probable exclusion or oppression and are actionable unless justified by legitimate business reasons grounded in economic efficiency.